

## Dispute Resolution in Saudi Arabia\*\*

Saudi Arabia is governed by *shari'a*, or Islamic law as based on the Qu'ran (the Muslim holy book), and on the *sunnah* (the deeds, utterances, and unspoken approvals of the Prophet Mohammed). Since 1928 Saudi courts officially have relied on the Hanbali School of Islamic Law, one of four such schools.<sup>1</sup> In practice, the Saudi Courts apply *shari'a*, to the exclusion of any other regulations, in cases involving domestic relations (including decedents' estates), criminal matters, questions of property, and generally in contract disputes.

Commercial activities generally, such as distributorship agreements, corporate matters, and government contracts, are subject to "Regulations" and "Implementing Rules," which are decreed or issued by the Saudi Council of Ministers and the various government ministries. These administrative rules and regulations are viewed as supplementing and conforming to, but not replacing, the *shari'a*. Because *shari'a* courts gen-

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\*\*The Editorial Reviewer for this article is Kevin M. Harris.

1. On 1/7/1347 H (1928 G) the Saudi Judicial Board issued a resolution mandating for Saudi courts, in secular transactions, to rely on Hanbali *fatawa*, or religious interpretations. See generally N. SALEH, THE GENERAL PRINCIPLES OF SAUDI ARABIAN AND OMANI COMPANY LAWS (1981).

Saudi Arabia officially uses the lunar Hejira calendar, which commences with the flight of the Prophet Mohammed from Mecca to Medina in 622 A.D. and has eleven fewer days each year than the Gregorian calendar. References in this article are to the Hejira date (H) with the corresponding Gregorian date (G); Hejira references refer to the Hejira month first, followed by the day.

erally adjudicate matters governed purely by shari'a, in these courts the various commercial rules and regulations are less relevant and rarely utilized. All Saudi courts, however, whether they be shari'a or commercial courts or arbitration tribunals, are meant to apply shari'a rules of evidence and procedure. For some commercial courts these procedural and evidentiary rules may be set forth in ministerial rules and regulations, but again they are implied to conform to shari'a.

The Saudi court system consists of several levels of shari'a courts that have general jurisdiction (including jurisdiction over civil matters), as well as various specialized judicial committees whose jurisdiction is determined by their respective constituting decrees. Although theoretically shari'a courts can hear certain commercial disputes, these disputes normally are adjudicated by the specialized committees, the principal ones of which are:

- the Board of Grievances;
- the Commercial Papers Committee (CPC);
- the Committee for the Settlement of Commercial Disputes (CSCD);
- the Commercial Agency Commission (CAC);
- the Saudi Arabian Monetary Agency (SAMA) Committee for Banking Disputes; and
- the Primary and Supreme Commissions for Labor Disputes.

In addition, Saudi Arabia implemented its own arbitration regulations in 1983. This article provides an overview of arbitration, shari'a courts, and the six judicial committees above, as well as choice of law and judicial procedures.

## **I. Choice of Law and Jurisdiction**

As a general rule, Saudi courts and regulations do not recognize the concept of conflict of laws other than conflicts among the different schools of Islamic law; these conflicts would be expected to arise, if at all, only in personal law matters brought before a shari'a court. Conflicts among schools of Islamic law would not be expected to arise in international commercial transactions. Consequently, if a commercial contract provides for a governing law that is not Saudi law, a Saudi court that takes jurisdiction of a dispute under that contract will ignore the choice of law and apply Saudi law.

The Saudi court normally will assume jurisdiction if a commercial dispute is brought before it, regardless of a contractual stipulation for exclusive submission to a non-Saudi court. Thus, should an American employee whose employment contract for work in Saudi Arabia with an American company is (i) subject to the law of one of the U.S. states and (ii) provides for dispute resolution in a court of that state, choose to sue his employer

in Saudi Arabia, the Commission for Labor Disputes probably will assume jurisdiction and apply Saudi law.

Certain commercial documents *must* provide for Saudi law to be the governing law and for Saudi tribunals to have jurisdiction. All contracts with the Saudi government are subject to Saudi law, and disputes arising under such contracts that are not amicably resolved must be submitted to the Board of Grievances.<sup>2</sup> As will be discussed later, some disputes involving the Saudi Government as a party that should be heard by the Board of Grievances may be submitted to arbitration on approval of the Council of Ministers. Articles of Association for Saudi incorporated companies will not be approved by the Ministry of Commerce (and hence the company will not be registered) unless they are subject to Saudi law and disputes thereunder are submitted to a Saudi court or Saudi arbitration.<sup>3</sup> Service agency contracts must be subject to Saudi law.<sup>4</sup> Nevertheless, whereas the Ministry of Commerce (MOC) in the past would not register a commercial agency or distributorship agreement unless it was subject to Saudi law and provided for disputes to be settled in Saudi Arabia, since late 1985 the MOC has taken the position that such an agreement may be registered if it provides for disputes thereunder to be resolved by arbitration outside Saudi Arabia, although still subject to Saudi law.

Other than the cases cited, private commercial agreements may stipulate a choice of any law and any forum to resolve disputes. Nevertheless, the enforcement of foreign judgments within the Kingdom is not a settled question, as is discussed in Section XI below.

## II. Shari'a Courts

Typically, the non-Saudi businessman would not seek redress of commercial grievances in the shari'a courts. Occasionally, however, the shari'a courts can be a useful forum for an undisputed claim because judgments generally are rendered more quickly than before the various commercial committees.

The shari'a courts, first organized in 1927, have general jurisdiction in all matters (e.g., civil, real property disputes,<sup>5</sup> criminal, and domestic

2. Council of Ministers Res. No. 58 dated 1/17/1383 H (June 9, 1963 G) and Council of Ministers Res. No. 818 dated 5/17/1396 H (May 15, 1976 G).

3. Ministry of Commerce, Companies Dept., Circular No. 31/1/331/91 dated 3/13/1399 H (Oct. 10, 1979 G).

4. This is implied by article 11 of the Service Agency Regulation issued pursuant to Royal Decree M/2 dated 1/21/1398 H (Dec. 31, 1977 G), which provides that all conflicts between a Saudi service agent and foreign contractor shall be settled by the CSCD, which would apply only Saudi law.

5. Commercial Court Regulation dated 1/15/1350 H (Feb. 6, 1931 G) [hereinafter CCR], art. 3, grants shari'a courts jurisdiction over real property disputes.

relations) except those for which a special committee (e.g., CSCD, CPC, and Labor) exists. Shari'a courts, divided between summary and ordinary courts, are administered by the Ministry of Justice pursuant to the Judicial Regulations of 1975<sup>6</sup> as amended, and a judge must be a Saudi national with a degree from a Saudi Islamic law college. The summary court can be viewed as a small claims court in that it has jurisdiction in civil matters in which the disputed amount does not exceed SR 8,000;<sup>7</sup> otherwise it has jurisdiction in all other matters mentioned above, save for land disputes and those criminal offenses whose penalties involve death or amputation of the hands. A single judge will hear a case. Ordinary shari'a courts have jurisdiction over civil cases where the disputed amount exceeds SR 8,000, criminal cases involving penalties of death or amputation of the hands, and land disputes. In the ordinary court, a single judge hears a civil case, but three judges sit on a criminal case.

A decision is appealable within fifteen days of the party's receipt of its notification. A court in Makkah hears appeals from the Western Province, and a court in Riyadh hears appeals from the Nejd (central province) and Eastern Province. An appeal is not limited to those aspects of a decision that have been appealed; the entire case can be reviewed. These three-judge appellate tribunals do not "reverse" lower court rulings. Rather, by a majority vote, they either confirm them (in which case the decision is final), or remand them to the court of first instance for retrial or with specific directions.<sup>8</sup> The retrial, however, must be limited to the points vacated by the appellate tribunal. If the original trial judge does not agree with an order from the appeal tribunal to retry or modify a decision, the appeal tribunal has the authority to vacate the original decision and refer the case to another judge for retrial.

Islamic law governs all disputes heard in the shari'a court; the judges are trained only in shari'a and often have no technical background to understand a complex, highly technical case. Hence, recourse to a shari'a court may be utilized best, for example, for an undisputed debt or an uncomplicated property dispute. It also should be remembered, however, that although both the CSCD and the CPC hear the more complex claims, the current members of these committees also are primarily shari'a trained.

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6. Royal Decree No. M/64 of 1975.

7. SR 1 = U.S. \$3.75.

8. Certain domestic law issues, where punishment is by death or amputation, are appealed to a five-judge tribunal, and the appellate decision is final on approval of the Minister of Justice. *See generally* A. LERRICK & J. MIAN, *SAUDI BUSINESS AND LABOR LAW* 222 (1982) [hereinafter LERRICK & MIAN].

### III. Civil Rights Directorate

The Civil Rights Directorate, under the authority of the Ministry of Interior and functioning as an arm of the Saudi police, is responsible for enforcing judgments. However, it also adjudicates uncomplicated or uncontested disputes involving, for example, check forgery or checks drawn on insufficient funds.<sup>9</sup>

As the Civil Rights Directorate has the right to imprison a debtor without delay where a matter is uncontested,<sup>10</sup> resort to the Directorate, or the threat thereof, can occasionally be successful in forcing recalcitrant debtors to meet payments. Debtors, however, frequently (and successfully) request that the case be transferred to the CPC or another court, anticipating that they can delay a final judgment through procedural tactics.

Even if the defendant does not so request, the Civil Rights Directorate can and should refer complicated and contested disputes to other appropriate courts.<sup>11</sup> Thus, if the plaintiff anticipates a defense or counterclaim, he is well advised to proceed directly to one of these committees, as the Civil Rights Directorate will or should refer the case there in any event.

### IV. Board of Grievances (Diwan al-Mazalim)

Formally established by Royal Decree No. 2/113/8759<sup>12</sup> and reconstituted under Royal Decree No. M/51,<sup>13</sup> the Board of Grievances (the Board)<sup>14</sup> has many functions, including being the exclusive forum for adjudication of disputes between a private contractor (whether Saudi or foreign) and the government entity with whom he has a public works contract.<sup>15</sup> As from December 31, 1987, the Board also has jurisdiction over all *new* cases that formerly would have been heard by the CSCD, that is, distributorship and service agency disputes, all nonbanking (in-

9. Gnichtel & Hameed, *Saudi Police Court Rules Codified*, MIDDLE EAST EXECUTIVE REP., Nov. 1985, at 9.

10. Regulation on Private Rights Claims, art. 8(a), issued pursuant to Ministry of Interior Decree No. 20 dated and effective 1/21/1406 H (Oct. 5, 1985 G). The Regulation updates the Regulation for Procedures for Foreign Claims for Private Rights issued pursuant to Royal Order No. 23512 dated 11/25/1380 H (May 9, 1961 G).

11. *Id.* arts. 8(d) and 31.

12. Dated 9/17/1374 H (Oct. 5, 1955 G).

13. Dated 7/17/1402 H (May 10, 1982 G).

14. For more detailed information about the Board of Grievances, see Mahassni & Grenley, *Public Sector Dispute Resolution in Saudi Arabia: Procedures and Practices of Saudi Arabia's Administrative Court*, 21 INT'L LAW. 827 (1987); Dallas, "Remarks Before the MEED/MONADNOCK Conference," London, November 22, 1982; Long, *The Board of Grievances in Saudi Arabia*, 27 MIDDLE EAST J. 71 (1973).

15. Royal Decree No. M/51 dated 7/17/1402 H (May 10, 1982 G), art. 8(d). This Royal Decree was published in Vol. 59, Issue No. 2919 of the Official Gazette of 8/5/1402 H (May 28, 1982 G).

cluding maritime) commercial disputes involving private litigants, and all disputes involving the Companies Regulations.<sup>16</sup> Disputes involving these issues that were lodged with the CSCD prior to December 1987 will continue to be adjudicated by the CSCD.

The Board consists of six three-judge panels (three in Riyadh and one each in Jeddah, Dammam, and Abha) and a six-person review committee in Riyadh. By law, all the panels must be composed of Saudi shari'a trained judges;<sup>17</sup> they are assisted by consultants who frequently are non-Saudi Arab legal advisors with experience in administrative law. The Board, at its own instigation or at the request of one or both parties to a dispute, also seeks assistance and reports from technical experts at local universities and at the Saudi Consulting House, a quasi-governmental consulting institution.

Saudi Arabia has no system of binding judicial precedent or case law. Nevertheless, Royal Decree M/51<sup>18</sup> required the Board to publish its decisions, and the first volume gives some indication of the Board's views on certain issues, which could be helpful in preparing a case.

It is unclear whether, as with the labor committees, a statute of limitations exists after which a claim cannot be brought before the Board. According to Council of Ministers' Resolution No. 968,<sup>19</sup> any claim against the public treasury for any right other than government salaries and allowances shall be barred if submission thereof is delayed for three years or more without legal excuse. This resolution possibly could be cited to support a three-year limitation period within which contractual disputes with the government must be submitted to the Board. The author, however, is not aware of any case in which a limitation period has been at issue. Moreover, the resolution fails to suggest at what point the three-year period commences—from the date of the final certificate, preliminary handover, last payment, or otherwise. Also not settled is whether any activity relating to the claim—for example, negotiations with the ministry involved—starts the limitation period anew.

The Board, unlike the CPC and CSCD, is a full-time judicial committee with hearings throughout the day. However, due to the backlog of cases, their complexity, and the time between hearings (frequently as long as six months), it is not uncommon for a case to require two to three years to adjudicate. The judges rely at each hearing on written submissions by the parties, oral argument and, as appropriate, reports from appointed outside technical experts. Although the Board has the right to call witnesses, it rarely does.

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16. Simpson, *Saudi Arabia: Reorganization of Judicial System*, INT'L FIN. L. REV., Aug. 1987, at 45.

17. Royal Decree No. M/51, *supra* note 15, art. 11.

18. *Supra* note 15.

19. Dated 9/15-16/1392 H (Oct. 22, 1972 G).

Evidentiary and procedural rulings are understood to have been drafted for the Board, but they have not yet been implemented. Local lawyers anticipate that some of the CSCD rules, i.e., for default judgments after a second consecutive nonappearance, will be adopted by the Board, but currently Board hearings operate informally without benefit of established rules of procedure or evidence.

Decisions are made by a majority vote and are reviewed before being finalized by the Board's president (who reports directly to, and is appointed by, the King) or his vice-president, either of whom can approve the draft decision<sup>20</sup> or refer it to the review committee for further consideration. The review committee considers the case *de novo* and either ratifies or modifies the original decision or refers it back to the original committee for further consideration before a final decision is issued.<sup>21</sup>

Final appeal of Board decisions is to be made to the King who, in at least one situation known to the author, ordered a case retried by the Board. Still unclear, however, is whether an appellate procedure will be introduced now that the Board has jurisdiction over most commercial disputes. The author's understanding is that generally, when a government agency is party to a case and loses, it does not appeal, although it has fifteen days to do so. The author is aware of at least one case, however, in which the government entity refused to pay the judgment as directed by the Board and appealed the judgment to the King. The appeal appeared not to have been successful as, after over a year's delay, the government entity made some payments to the foreign contractor pursuant to the judgment.

Although most public sector contracts provide that the parties only proceed to the Board after failing to resolve their disputes amicably, the current trend among government agencies appears to be to encourage contractors who have disputes to proceed directly to the Board. The basis for such direct action is that the Ministry of Finance is bound to authorize payment by a ministry if the Board rules against the ministry, whereas a ministry under budgetary restraint frequently does not get permission (or funds) to pay a ministry-negotiated settlement.

## V. Commercial Paper Committee (CPC)

Established in 1968 as a committee within the Ministry of Commerce (MOC),<sup>22</sup> the CPC has jurisdiction over claims involving bills of exchange, checks, and promissory notes. It has branches in Dammam, Jeddah, Ri-

20. Dallas, *supra* note 14.

21. *Id.*

22. Originally the CSCD had jurisdiction over commercial paper disputes, but a separate committee was established by virtue of Ministry of Commerce and Industry Res. No. 354 dated 5/11/1388 H (Oct. 6, 1968 G).

yadh, Al Qasim, and Al Hasa. Cases in each venue are heard by a panel composed of a chairman trained in shari'a and nominated by the Ministry of Justice and, subject to availability, two "legal experts" (who need not be lawyers) appointed by the Ministry of Commerce. Practically speaking, however, as of early 1986 the case load in both Riyadh and Jeddah was so heavy that a single judge, and not a three-member panel, was being assigned to each case in these cities.

Cases are commenced by direct application to the CPC, but can also be referred by the Civil Rights Directorate if the Directorate determines that the case involves disputed issues of law or fact.<sup>23</sup> Once the CPC accepts the case, the plaintiff (or his lawyer) or the committee itself serves the summons on the defendant or his authorized representative. Venue is proper in the defendant's place of residence (if an individual) or incorporation (if a company). However, as foreign plaintiffs frequently have only a post office box address for the Saudi defendant, they often find it difficult to locate the defendant. A foreign plaintiff would be well advised to procure, at the outset of a relationship, maps or good directions to his partner's, agent's, or buyer's residence or place of business for use should a dispute later arise.

Assuming the defendant is properly served and appears before the court, written submissions are exchanged in a series of hearings at which the judges can question the parties at any time. A committee, however, may rely on the written submissions.

Like the CSCD, CPC hearings are held in the evening after the sunset prayer; the judges usually work elsewhere during the day, for example at a university or in a ministry. Pursuant to article 1 of MOC Decision No. 859,<sup>24</sup> CPC procedure follows the procedure established in chapters 5 through 9 and chapter 12 or part III of the Commercial Court Regulation (CCR).<sup>25</sup> Substantive issues are determined according to the Negotiable Instruments Regulation, issued pursuant to Royal Decree No. 37.<sup>26</sup>

The Negotiable Instruments Regulation prescribes in article 84 the various limitation periods before which actions must be brought before the CPC. These are:

- within three years of the date of maturity if the action is against the maker of a promissory note or check or against the acceptor of a bill of exchange, assuming the instrument is made payable without protest;
- in an action brought by the holder of the instrument against the drawer or endorser, then within one year of the date of protest made within

23. Regulation on Private Rights Claims, *supra* note 10, arts. 9(d) and 31.

24. Dated 3/13/1403 H (Dec. 28, 1982 G).

25. Royal Decree No. 32, dated 1/15/1350 H (Feb. 6, 1931 G).

26. Dated 11/10/1383 H (Feb. 24, 1969 G).



the statutory time limits or within one year of the date of maturity if the negotiable instrument contains a waiver of protest (as most Saudi negotiable instruments do);

- in actions between endorsers or by an endorser against the drawer, then within six months from the date the endorser paid the bill or within six months from the date an action is brought against the endorser; or
- within six months from the expiration of the time limit to present a check. Article 103 of the Negotiable Instruments Regulation in turn prescribes that checks drawn and payable in Saudi Arabia must be presented within one month of the check's date and, if drawn abroad and payable in Saudi Arabia, then three months from the check's date.

A demand promissory note, which matures on the date of demand, must be presented for payment within one year of the date of issuance, failing which it shall become stale and no action may be brought on it before the CPC. If a demand promissory note is presented for payment within one year of its issue date, the holder then has three years within which to commence proceedings against the maker of the note.<sup>27</sup>

These limitation periods apply in all cases except when the debt is acknowledged by the debtor, has been adjudicated, or the debt commences anew through novation.<sup>28</sup> In those circumstances the case may be heard after expiration of the prescribed time limit. Moreover, although the limitation period may have expired, the debt itself may be enforceable through an action in the shari'a court or the Board of Grievances under its expanded jurisdiction. The plaintiff, however, would no longer have the benefit of the evidentiary advantage of the negotiable instrument.

The plaintiff must present the CPC with the original negotiable instrument and, in the case of a dishonored check or bill of exchange, a letter or other evidence of dishonor from the bank. The Negotiable Instruments Regulation follows annexes 1 respectively of the Geneva Convention Providing a Uniform Law for Bills of Exchange and Promissory Notes (June 7, 1930) and the Geneva Convention Providing a Uniform Law for Checks (March 19, 1931). Hence, the negotiable instruments should be in the same form as that provided in the Convention. Indeed the CPC in Riyadh

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27. Although the Negotiable Instruments Regulation specifies the statutory periods in terms of Hejira years, the author understands that the CPC on an informal basis applies the same statutory period, i.e., three years from date of maturity, presentment, etc., in terms of the Gregorian calendar if the negotiable instrument bears a Gregorian rather than Hejira date.

28. Negotiable Instruments Regulation, *supra* note 26, art. 85.

in one case refused to enter judgment on a promissory note because it lacked the words "for value received."

Provisions for interest are not enforceable according to article 6 of the Negotiable Instruments Regulation. The unenforceability of an obligation to pay interest, however, does not affect the obligation to pay principal, and the latter obligation would be upheld by the CPC. Unless apparent from the face of the negotiable instrument or from evidence submitted by the borrower that interest is included, the CPC normally will grant a judgment for the full amount of the negotiable instrument. On application of the debtor, however, the CPC has been known to offset against payment of the principal due and unpaid any interest previously paid by the debtor to the plaintiff, even if paid voluntarily.

Although a negotiable instrument is, according to the Negotiable Instruments Regulation, valid on its face and enforceable without reference to related agreements or obligations, the CPC in Riyadh has been known to request, or to honor a party's request for, the submission in evidence of related documents, such as the underlying contract for which the instrument was executed. In one case, the CPC in Riyadh requested proof that money lent, repayment of which the lender was seeking, actually had been transferred to the borrower. If, based on the face of the instrument or from evidence cited at hearings, the CPC determines it is essential to refer to extraneous circumstances (e.g., if allegations of fraud are made) or other documents in order to decide the case, the CPC may also transfer the case to the Board of Grievances, if neither party is a bank, or to the SAMA Committee, if one party is a bank.

The defendant can delay the action in the CPC by repeatedly requesting new information or documents from the plaintiff, thereby forcing an adjournment. Defendants have been known to change lawyers in the course of litigation; the new lawyer will then request additional time to familiarize himself with the case. Defendants frequently fail to appear, thereby forcing postponement. As in the shari'a courts and the CSCD, default judgment is permitted after the defendant has failed to appear twice in succession, but the defendant can appeal a CPC default judgment within fifteen days of notice of its issue.<sup>29</sup> Appeal is to the Legal Committee of the Ministry of Commerce (the Legal Committee) who can confirm, quash, or amend the judgment.<sup>30</sup> If the defendant fails to appear at the appellate hearing,

29. CCR, *supra* note 25, arts. 529 and 531 and Ministry of Commerce Res. No. 859, *supra* note 24, art. 7.

30. The Legal Committee reportedly is composed of the Assistant Deputy Minister of Commerce for Legal Affairs, a legal advisor to the MOC and a law professor at King Saud University. See Vogel, *Decision No. 822 on Banking Disputes: An Analysis*, MIDDLE EAST EXECUTIVE REP., Apr. 1986, at 9.

however, the appeal normally will be dismissed and the default judgment upheld.<sup>31</sup> According to the CCR, article 533, the "costs of a judgment in default shall always be borne by the judgment debtor." Otherwise, each party normally bears its own costs, despite a provision in article 60 of the Negotiable Instruments Regulation permitting a summons to include a request for costs.

Appeal of other than default judgments is likewise to the Legal Committee, but must be made within thirty days of the appellant's receipt of notice of the judgment.<sup>32</sup> The author, however, is aware of at least one case in Riyadh in which an appeal, based on a procedural issue, was accepted *after* the statutory deadline. When the original judge declined to review the case on the grounds that he believed he made the correct decision, the Legal Committee appointed another judge to retry the case (as is permitted in shari'a courts).

## VI. Committee for the Settlement of Commercial Disputes (CSCD)

The CSCD,<sup>33</sup> has jurisdiction over commercial and service agency disputes, disputes involving the Companies Regulation and generally over all nonbanking (including maritime) commercial disputes between private litigants (whether each litigant is Saudi, or a Saudi company, and/or foreign) if the dispute was submitted to the CSCD prior to December 1987. All cases arising after that date are to be submitted to the Board of Grievances. Although the CSCD is intended to be phased out in favor of the Board, the phase-out will not be completed for a number of years due to the length of time required to adjudicate the cases already before it. Moreover, an appeal committee for the CSCD was established in Riyadh in the latter part of 1987. The three members include one judge each from the Ministry of Justice and the Board and a representative from the MOC. Like the CPC, the CSCD is administered by the MOC and has branches (except for appeals) in Dammam, Riyadh, and Jeddah. Each three-judge panel in the branches consists of two members who are trained in shari'a and nominated by the Minister of Justice, and a member knowledgeable about commercial law, appointed by the MOC. The appellate committee can ratify the CSCD judgment or return it to the CSCD for reconsideration, with reasons for not ratifying the judgment. On *renvoi*, the CSCD can accept the appellate committee's decision or reject it with reason. The judgment then can be returned to the appellate committee, whose second decision is final.

31. CCR, *supra* note 25, art. 534.

32. *Id.* art. 543.

33. Established pursuant to Council of Ministers Resolution No. 186 dated 5/2/1387 H (May 14, 1967 G).

Apart from a requirement in the CCR that the plaintiff submit his complaint along with a request for the court to issue a summons, no provision exists that mandates an exchange of evidence or pleadings *before* each hearing and, in the few cases where the Jeddah CSCD has directed the parties at one hearing to exchange pleadings prior to the next hearing, the CSCD has not enforced the order (i.e., by penalty) when the party so directed failed to timely produce the pleading. In theory, however, the CSCD and CPC each can compel the production of evidence,<sup>34</sup> whereas shari'a courts allegedly cannot on the grounds that, under shari'a, testimony cannot be compelled.<sup>35</sup>

As in the CPC, a defendant can delay proceedings before the CSCD by appearing only at every third hearing without significantly risking a default judgment. As it is not unusual for hearings to be postponed, or scheduled at three-month intervals, the effect of the defendant's delay tactic is that two to three years may be required to settle a case in the CSCD and a similar, or longer, period of time to enforce it.

## VII. Commercial Agency Commission (CAC)

Pursuant to the original Implementing Rules of the Commercial Agencies Regulations, a three-member tribunal was established in 1969 in Riyadh, under the MOC, to enforce the Commercial Agencies Regulation.<sup>36</sup> The CAC has no jurisdiction over civil claims, but investigates and adjudicates violations of the regulation governing Saudi commercial agents and distributors. Now, however, the Board of Grievances also has jurisdiction over disputes arising between a (usually foreign) supplier and distributor/agent, particularly when the dispute involves damages or claims of a general contractual nature not necessarily pertaining to a violation of the Commercial Agency Regulation.

One of the three members of the CAC must be a legal consultant appointed by the Minister of Commerce; the other two may be MOC employees.<sup>37</sup> The CAC appears to function as an investigative body whose recommendations for penalties for violations of the Commercial Agencies Regulation must be approved by the Minister of Commerce;<sup>38</sup> decisions of the CAC can be appealed to the Minister within fifteen days of receipt by the appellant of notice of the CAC's decision.<sup>39</sup>

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34. CCR, *supra* note 25, art. 498.

35. LERRICK & MIAN, *supra* note 8, at 232.

36. Royal Decree M/5, art. 1, dated 6/11/1389 H (Oct. 17, 1969 G).

37. Commercial Agencies Regulations, Implementing Rules Issued by Minister of Commerce Res. No. 1897 dated 5/24/1401 H (Mar. 30, 1981 G), art. 21.

38. *Id.*

39. *Id.*

### VIII. SAMA Committee For Banking Disputes

On March 10, 1987, a three-person conciliation committee was created within the Saudi Arabian Monetary Agency (SAMA) pursuant to Council of Ministers Resolution No. 729/8<sup>40</sup> to "study" cases between banks and their customers unrelated to commercial paper. At the same time, the CSCD and shari'a courts were ordered to suspend hearings of all banking disputes and submit them to the Office of the Presidency of the Council of Ministers for transfer to the SAMA Committee.

The SAMA Committee replaces a banking disputes committee established in early 1986 within the MOC by MOC Resolution No. 822.<sup>41</sup> This resolution assigned to the already existing Legal Committee in the MOC "the settlement of disputes between banks and their customers arising from contracts and banking operations executed or performed *after* the coming into force of this resolution." The resolution came into force on January 10, 1986, and was understood to apply to disputes involving Saudi customers with non-Saudi as well as Saudi banks.<sup>42</sup>

Following publication of Resolution No. 822, some Saudi lawyers questioned its legality, asserting that as the CPC and CSCD had been created by resolutions of the Council of Ministers (a body similar in function and authority to a Cabinet), the jurisdiction of the CSCD and CPC could not be superseded by a body such as the Legal Committee whose authority, at least with respect to banking disputes, had been established by ministerial resolution from the MOC rather than by the Council of Ministers. The Legal Committee never commenced work, however, and the SAMA Committee, established by a Council of Ministers Resolution, should overcome the concerns expressed about the authority of the earlier Legal Committee.

The SAMA Committee, which meets only in the evenings after sunset prayer like the CPC, can recommend (i) the attachment of assets, (ii) restrictions on foreign travel of litigants, and (iii) freezing of bank accounts and of public sector payments owed to customer defendants. The Committee has the power to request a government agency to cease dealing with a particular customer involved in a dispute. In addition, other creditors of the debtor may submit claims to the Committee against the same debtor to ensure (according to the Council of Ministers Resolution) that banks are treated *pari passu* with other creditors.

Rules of procedure or evidence have yet to be promulgated for the SAMA Committee, although a draft is being circulated. Hearings are

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40. Dated 7/10/1407 H (Mar. 10, 1987 G).

41. Dated 4/13/1406 H (Dec. 26, 1985 G).

42. Vogel, *supra* note 30, at 22.

conducted on an informal basis with the emphasis, as in other committees, on written submissions.

The SAMA Committee emphasizes conciliation of disputes rather than the use of judicially imposed decisions. It is therefore unclear whether it will be able to issue or enforce on its own a final adjudication honored by all parties or merely make recommendations not binding on the parties. The Committee's constituting resolution refers to the Committee's purpose as "studying" disputes and finding "an appropriate solution" between the parties. If the Committee fails "to arrive at a settlement satisfactory to the two parties," the Committee "shall refer the dispute to the Court with jurisdiction for decision of the case." This wording suggests that the SAMA Committee, if it cannot settle the dispute by conciliation, will only delay settlement, as the case would be referred to a shari'a court or the Board of Grievances for a *de novo* hearing as originally provided for prior to the March Council of Ministers Resolution.<sup>43</sup> Thus far, lawyers report that the SAMA Committee has accepted for adjudication those claims not involving complicated issues of law or fact. How it will address complicated claims, once the backlog of these earlier cases is reduced, remains to be seen.

### **IX. Commissions for the Settlement of Labor Disputes**

The Labor Law Regulation (the Labor Regulation), issued pursuant to Royal Decree No. M/21,<sup>44</sup> established Primary Commissions for the Settlement of Labor Disputes (the Primary Commissions) and a Supreme Commission for the Settlement of Labor Disputes (the Supreme Commission). Procedure before these commissions is governed by Rules of Procedure, Conciliation, and Arbitration Proceedings before the Primary Commissions and Supreme Commission (the Labor Rules), which were issued, pursuant to article 177 of the Labor Regulation, by Council of Ministers Resolution No. 1.<sup>45</sup>

Primary Labor Commissions exist in Riyadh, Jeddah, and Dammam. The chairman of each Primary Commission must hold a degree in shari'a and at least one of the other two members of the committee must hold a degree in shari'a, administrative, or civil law.<sup>46</sup> These Primary Commissions have exclusive and final jurisdiction over labor disputes relating to (a) claims not in excess of SR 3,000, (b) requests to stay execution of

43. Council of Ministers Resolution No. 729/8 dated 7/10/1407 H (March 10, 1987 G), arts. 2 and 7.

44. Dated 6/9/1389 H (Nov. 15, 1969 G).

45. Dated 4/1/1390 H (May 11, 1970 G).

46. Labor Regulation, *supra* note 44, art. 173.

unlawful terminations by employers, and (c) the imposition on employees of fines by employers under article 125 of the Labor Regulation.<sup>47</sup>

The Primary Commissions also have jurisdiction in the first instance over cases (a) in excess of SR 3,000, (b) generally relating to termination, and (c) involving labor-related injuries, but decisions in these three areas may be appealed to the Supreme Commission.<sup>48</sup> The Supreme Commission, located in Riyadh, is a five-person appellate panel, composed of three representatives of the Ministry of Labor, one from the Ministry of Commerce, and one from the Ministry of Petroleum.<sup>49</sup>

According to article 13 of the Labor Regulation, cases concerning any violation of the Labor Regulation are time barred after twelve months from the date of the occurrence of the violation and cases relating to any rights provided in the Labor Regulation are time barred after twelve months from the date of termination of employment. Foreign workers who have left Saudi Arabia nonetheless can litigate claims in Saudi Arabia against former employers within the statutory limitation period by granting a power of attorney from abroad to a Saudi lawyer.

Labor dispute proceedings usually are commenced by the delivery of a complaint to the labor office in the area in which the employee is working. If the local labor office fails to arrange an amicable settlement between the parties, it refers the case to the Primary Commission covering that particular geographic region. If service of process is outside the jurisdiction of that Primary Commission but within Saudi Arabia, the Commission will send it to the Primary Commission where the party is domiciled and that Commission will serve the papers.<sup>50</sup> If the party is outside Saudi Arabia, service is permitted (as with the CSCD) by registered mail or diplomatic channels.<sup>51</sup> Also as with the other committees, the party either can appear in person or be represented by an attorney, and if the defendant does not initially appear, another hearing will be scheduled. The Primary Commission can award a default judgment if the defendant fails to appear a second time without an acceptable excuse.<sup>52</sup>

The parties may, but are not compelled to, submit written submissions to the Primary Commission. Like the CSCD and CPC, the Primary Commission has the right to compel production of evidence (real and docu-

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47. Article 125 requires employers of more than twenty persons to publicly post a list of penalties and bonuses and the terms under which they are to be imposed or granted.

48. Labor Regulation, *supra* note 44, art. 174.

49. *Id.* art. 175.

50. Labor Rules, *supra* note 45, art. 19, as cited in LERRICK & MIAN, *supra* note 8, at 73.

51. *Id.* art. 18.

52. *Id.* arts. 33 and 34.

mentary) and call witnesses.<sup>53</sup> Any claims, defenses, replies, and counterclaims can be made at the hearing, but if the defendant makes no reply, the Commission has the right to view his silence as a nonappearance at the hearing and to grant a judgment in favor of the plaintiff.<sup>54</sup> As with other committees, a decision is based on a majority vote; the dissenting judge must state the reasons for his dissent on the record but the dissent is not recorded in the decision itself.<sup>55</sup>

Awards for which the Primary Commission does not have final authority can be appealed within thirty days of the party's receipt of the notification of the decision.<sup>56</sup> If there is no appeal within that statutory time limit, the award is deemed to be final and can be enforced either through the Supreme Commission or through the labor office itself. If the award is appealed, no new claims can be raised against the original parties, nor can new parties be joined.<sup>57</sup> The Supreme Commission adjudicates the appeal on the basis of the legal argument and the record, although it does have the right to summon witnesses and to request further evidence.<sup>58</sup> The Supreme Commission can vacate the Primary Commission judgment in whole or in part; if it does so, it need not remand the case but rather can enter a final judgment.<sup>59</sup> Decisions of the Supreme Commission are final and enforceable as of the date the parties receive notice of that decision.<sup>60</sup> Article 14 of the Labor Regulation permits costs to be awarded to the successful party. Although the CSCD and CPC appear to disregard similar provisions for award of costs in their rules of procedure, the author is aware of labor commissions ordering the losing party to pay all costs.

The Labor Regulation permits employers and employees to submit their disputes to arbitration rather than to the Primary Commission.<sup>61</sup> The arbitration agreement must specify the arbitration procedure and limit the duration of the arbitration; if it specifies that the arbitrators' decision is final, no appeal is permitted. If the arbitration agreement contains no such provision, appeal is permitted to the Supreme Commission.

The arbitration agreement is filed with the Primary Commission that would have had jurisdiction had the dispute been litigated, and the arbitrators' award must be registered with that same Primary Commission

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53. Labor Regulation, *supra* note 44, art. 179.

54. Labor Rules, *supra* note 45, art. 36, as cited in LERRICK & MIAN, *supra* note 8, at 75.

55. Labor Regulation, *supra* note 44, art. 178.

56. *Id.* art. 180.

57. Labor Rules, *supra* note 44, arts. 66-67, as cited in LERRICK & MIAN, *supra* note 8, at 76.

58. Labor Regulation, *supra* note 44, art. 179.

59. *Id.* art. 177.

60. *Id.* art. 182.

61. *Id.* art. 183.



within one week of its issuance. The chairman of the Primary Commission makes the award executory, after which it can be implemented.

The arbitration provisions in the Labor Regulation, which specify different methods of commencing an arbitration and different time limits for issuing an award from those found in the Arbitration Regulation and Rules, are not overridden by the Arbitration Regulation and Rules.

## X. Arbitration

Saudi Arabia promulgated its own arbitration legislation (the Regulation) pursuant to Royal Decree M/46.<sup>62</sup> The Implementation Rules to the Regulation (the Rules) were issued by Council of Ministers Resolution No. 7/2021/M.<sup>63</sup> The Rules describe in detail procedural matters, such as the manner of initiating and conducting the arbitration, issuing summonses, calling witnesses and experts, and handling nonappearances.

Although neither the Rules nor the Regulation specifically mandate that Saudi law must govern the arbitrated dispute, article 39 of the Rules states that the arbitration award "shall follow the provisions of shari'a and the applicable regulations." The arbitrations conducted thus far under the Regulation have been conducted according to Saudi law and, more specifically, shari'a rules of evidence.

The arbitrators must be Muslims and an arbitration panel must be uneven in number.<sup>64</sup> Whether non-Saudi Muslim arbitrators must have some connection with the Kingdom, such as residence or work is unclear. According to the Rules, the chairman of the arbitral tribunal must be knowledgeable either in shari'a or in Saudi commercial regulations and practice. Hence, for practical reasons, it may be better that at least one (if not all) of the arbitrators be Saudi. The CSCD, which in most arbitrations commenced before December 1987 had been the appointing authority that approved the terms of reference, in at least one instance refused to accept a non-Muslim as the advocate for one of the parties, but the CSCD in another location has accepted non-Muslim advocates.

As in the Saudi courts, the official language of the arbitral proceedings must be Arabic, with interpreters permitted.<sup>65</sup> Translation is simultaneous.

62. Dated 7/12/1403 H (Apr. 25, 1983 G), with effect from July 3, 1983. For more detailed explanations of the Saudi arbitration legislation, see Allam, *Saudi Arabia Arbitration: Implementation Rules*, Middle East Executive Rep., Aug. 1985, at 9; Van den Berg, *National Report on Saudi Arabia*, 1984 INTERNATIONAL HANDBOOK ON COMMERCIAL ARBITRATION 7.

63. Dated 9/8/1405 H (May 27, 1985 G), with effect from June 28, 1985.

64. Rules, *supra* note 63, art. 3.

65. *Id.* art. 25. The author understands that this rule is being adhered to even in cases where all the lawyers, parties, and witnesses (save the arbitrators) are non-native Arabic speakers and may know no Arabic. However, according to an extract in the Official Gazette

At the end of each day of hearings, the parties have to sign the Arabic translation (as in the Saudi courts) and attest it as the correct account of the proceedings. All written submissions should be in Arabic or translated into Arabic. Even if the arbitrators were to accept some documents in other than Arabic, a Saudi party, should it lose the arbitration, conceivably could appeal on the basis that the proceedings were not entirely in Arabic as required and therefore adversely and materially affected its participation and representation.

Neither the Regulation nor the Rules stipulate that the actual arbitral proceedings must take place in Saudi Arabia. In theory, therefore, they could be held elsewhere and enforced in Saudi Arabia, as long as the proceedings complied with the Regulation and Rules. In practice, however, the local "committee" that would have had jurisdiction had the matter not gone to arbitration (such as to the CPC or Board of Grievances) is to oversee the arbitration; logistically, it would be difficult for the committee to oversee an arbitration conducted abroad, ensure its compliance with the Rules, and enforce the award if the losing party did not honor the award. In any event, it may be that the losing party, to delay enforcement, will insist that a Saudi court review an award issued outside Saudi Arabia to establish compliance with the Regulation and Rules.

Article 8 of the Rules permits a Saudi government entity, with authorization from the Council of Ministers, to settle a dispute by arbitration. Prior to the existence of article 8, a government entity was prohibited, by virtue of article 2 of Ministerial Resolution No. 58,<sup>66</sup> from agreeing to arbitration as a method of settling disputes; disputes are to be adjudicated by the Board of Grievances. Still unclear, however, is whether the Council of Ministers' approval for arbitration is required before the original contract between the government and the private party is signed or merely at the time a dispute arises that the parties wish to arbitrate. Article 7 of the Regulation suggests that Council of Ministers' approval may be required prior to signing the contract and that the arbitration provision be written into the contract. Article 8 also may be intended for multiparty arbitration where the Saudi government entity is only one of

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of July 18, 1986, the MOC approved articles of association for a limited liability company called the Saudi Company for Building Materials, which provide for arbitration *in English* in Saudi Arabia subject to the Regulation and Rules. The author is aware of no other instance where use of the English language in a Saudi judicial proceeding has been approved and it is unclear if this is an oversight by the MOC or a new policy despite article 25.

66. Dated 1/17/1383 H (June 25, 1963 G).

many parties to the dispute. To the author's knowledge, article 8 has not yet been invoked, although at least one Saudi quasi-governmental entity engaged in Alternative Dispute Resolution (ADR) in 1985 with a U.S. company with the appointment of a single conciliator.

Prior to the Regulation and the Rules, there were known cases of a Saudi court accepting jurisdiction in a dispute, despite a contractual provision to arbitrate, when one party, unwilling to go to arbitration, commenced a court case. Frequently, however, the contractual provision called for arbitration under other than Saudi arbitration rules, and the Saudi court was merely seizing jurisdiction. Article 7 of the Regulation states that if the parties agree to arbitration *before* occurrence of the dispute (i.e., in their contract), the dispute can *only* be resolved by arbitration. Neither the Regulation nor the Rules, however, address the issue of a recalcitrant party who, having signed a contract with an arbitration clause, (i) refuses to sign the arbitration instrument or (ii) initiates a case directly in a Saudi court. The issue would have to be directed to the committee that would have had jurisdiction had the case been initiated in a court (e.g., the CPC), if only to request that committee to appoint an arbitrator and enforce the contractual agreement to arbitrate. One can envisage a considerable delay in obtaining a judicial decision from the committee, especially if the recalcitrant party fails from time to time to attend a hearing. To the author's knowledge, no test cases have as yet challenged article 7.

Whereas in most countries one of the reasons to select arbitration is to avoid court procedures and delays, Saudi arbitration is directly linked with the commercial committees and courts. Specifically, articles 6 and 7 of the Rules state that the agreement to arbitrate and/or terms of reference adopted by the parties must be submitted for approval (to be given within fifteen days of submission) to "the authority originally competent to decide the dispute." Although neither the Regulation nor the Rules define this authority, it would be the shari'a court in domestic matters, the CPC if the arbitration involves a negotiable instrument, the SAMA Committee for banking disputes, and the Board of Grievances if the dispute were commercial, involving nongovernment entities, or if a governmental entity were to receive permission from the Council of Ministers to arbitrate with a contractor with whom it had a dispute. A clerk of the "competent authority" is to act as a secretary for the arbitration tribunal and coordinate summonses. The parties must pay the cost of the secretary in addition to that of the translators and "court" reporter. The "competent authority" also has the responsibility and power to appoint arbitrators when the parties fail to do so, hear objections against the arbitrators, and adjudicate disputes concerning arbitrators' fees.

Procedurally, the arbitrators are permitted to seek the advice of experts, but are not bound by that advice. In at least one arbitration since the Regulation, the arbitrators would accept only written submissions from expert witnesses; they would not agree to a personal appearance of experts. On the other hand, under shari'a rules of evidence, real evidence is admissible, but must be proved either by admission or by oral evidence.

The arbitrators can call and cross-examine witnesses at their own initiative or at the request of one of the parties (Articles 31-34 of the Rules). Cross-examination is not limited to issues raised on direct examination. Article 28 of the Rules permits discovery, under certain conditions, either by a motion of the arbitrators or at the request of one of the parties.

Article 9 of the Regulation requires the arbitrators to issue an award within ninety days of completion of the hearings and submission of all documents, but article 15 of the Regulation permits the arbitrators to extend the deadline under prescribed circumstances.

The "competent authority" must make the award executory, so as to enable its implementation. Section 44 of the Rules permits execution of the award by any means, "even if such execution requires application of force by the police."

Theoretically, the new arbitration Regulation and Rules provide an expedient alternative to the Saudi courts. In addition, the parties can appoint their own arbitrators who may be more technically competent to resolve a complicated contractual dispute than the judges in the courts. Moreover, arbitration offers more opportunity than a court for a full review of the documents, the use of outside experts (even if only through written submissions), and examination of witnesses.

On the other hand, neither the Rules nor the Regulation address the consequences of either the arbitrators or the competent authority failing to observe the time limits established in the Rules and Regulation; indeed there are no time limits within which the competent authority must (i) appoint an arbitrator if the parties have failed to do so, or (ii) decide on an objection to enforcement of the arbitral award. Thus, arbitration probably will be preferable if the parties can select technically competent arbitrators and both parties are equally interested in quick proceedings. An uncooperative party to a dispute conceivably could interrupt and lengthen the arbitral proceedings such that they would be no less time consuming than a dispute brought before a specialized committee.

Finally, one must consider the costs of the arbitrators, the secretary appointed by the "competent" committee, the court reporter, and translators for documents and the proceedings. A rental fee for the chamber must also be taken into account since in at least a few cases the competent committee has insisted that proceedings be held in a room rented from the local Chamber of Commerce.

## **XI. Enforcement of Foreign Judgments and Arbitral Awards**

Article 8(1)(g) of the Board of Grievances Regulation, issued pursuant to Royal Decree No. 51,<sup>67</sup> grants the Board of Grievances authority to enforce judgments issued by the courts of a country that is a signatory to the Convention of the Arab League on the Enforcement of Judgments (the Convention) dated September 15, 1952. Nevertheless, the author is aware of no instances when the enforcement of such a foreign judgment has been sought before the Board; it is unclear, therefore, whether the Board will review the judgment itself or refer it to one of the other specialized committees for a new hearing. Nor is it clear how the Board would handle a request to enforce a judgment issued in an Arab country, such as Bahrain, that is not a signatory to the Convention.

Application for enforcement of a foreign judgment or arbitral award also may be made to the regional governor where the defendant resides or has his place of business, or to the Saudi Foreign Ministry through diplomatic channels. In either case, it appears the matter would be transferred via the Council of Ministers to the court that would have had jurisdiction had the case been instituted in Saudi Arabia.

As a matter of policy, it would appear that judgments issued by courts or arbitral tribunals not party to the Convention will not be enforced in Saudi Arabia without a new hearing before the appropriate Saudi court, subject to Saudi law. Consequently, any such foreign judgment would only be enforced to the extent that it was consistent with Saudi law.

As stated above, the author is not aware of any enforcements of foreign judgments. In practice, the reason may be that potential plaintiffs believe that they may as well initiate proceedings in Saudi Arabia, since the enforcement of a foreign judgment probably will involve a new trial in Saudi Arabia, which could be as lengthy as if the dispute originally had been adjudicated in Saudi Arabia. For this reason, foreign entities preferring non-Saudi law and a non-Saudi forum should be aware of the location of the Saudi party's foreign assets and select the applicable foreign law and jurisdiction accordingly to avoid having to satisfy a foreign judgment in Saudi Arabia.

With effect from June 7, 1980, Saudi Arabia became a party to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, concluded on March 18, 1965, in Washington, D.C. Article 54(1) of the Convention requires each contracting state to recognize as binding an award determined pursuant to the Convention and to enforce that award within its own boundaries as if it were a final judgment of one of its own courts. Pursuant to that same Convention, a

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67. Dated 7/12/1403 H (Apr. 25, 1983 G).

foreign private party and a contracting state may agree in writing to submit for resolution to the International Center for the Settlement of Investment Disputes (ICSID) any legal dispute arising directly from a foreign investment. The author, however, is aware of no instance of Saudi Arabia submitting to ICSID jurisdiction in respect of a dispute.<sup>68</sup>

## XII. Enforcement of Local Judgments

The Civil Rights Directorate of the Police acts as the enforcement agency for all courts and specialized committees except for the Board of Grievances. Thus, once a judgment is issued, the successful plaintiff or his representative must deliver a copy of the judgment to the Civil Rights Directorate for service on the defendant. If the defendant fails to satisfy the judgment, the Civil Rights Directorate can imprison him or can authorize the creditors to determine the nature and location of the defendant's assets, which can then be ordered to be sold by application to the shari'a court.<sup>69</sup>

Under certain circumstances the Regulation on Private Rights Claims permits the release of a judgment debtor if he furnishes a guarantee.<sup>70</sup> In addition, an application to prevent the judgment debtor from leaving Saudi Arabia (which was formerly made to the regional governor) is now made to the Civil Rights Directorate, which will refer the application to the appropriate court for a determination.<sup>71</sup> This new process could mean that it will take more time for a decision to be reached than with the application to the regional governor.

The wording of the Regulation on Private Rights Claims appears to make it is more easily applied to individual rather than corporate defendants unless the Directorate applies the Regulation to officers of a corporate defendant, i.e., by restricting an officer's ability to leave Saudi Arabia until the company honors a judgment against it.

Notwithstanding the guidelines for enforcement of judgments, the author is aware of several instances when regional governors have issued a moratorium on any new cases being introduced against well-known debtors and have granted a grace period for enforcement of judgments already issued against the individuals. In addition, CCR article 517 permits the court to give a judgment debtor "a suitable time limit to pay off his debt"

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68. Saudi Arabia, when signing the ICSID Convention, excluded from ICSID's jurisdiction matters relating to "oil and acts of national sovereignty." Crawford & Johnson, *Arbitrating with Foreign States and Their Instrumentalities*, INT'L FIN. L. REV., Apr. 1986, at 11.

69. Regulation on Private Rights Claims, *supra* note 10, arts. 14, 15, 16.

70. *Id.* art. 8(c).

71. *Id.* art. 23.

if the debtor is shown to be insolvent. These aspects of the CCR have not been overruled by the Regulation on Private Rights Claims.

### **XIII. Attachment as a Means of Enforcing a Judgment**

Under CCR, part III, chapter 12, a creditor in a business transaction has the right to seek a pretrial or post-judgment attachment of the debtor's property. As a matter of practice, however, pretrial and post-judgment attachment provisions seem rarely to have been enforced or utilized in the past few years, except for pretrial ship arrests. The reason may be related to the provisions of CCR article 584, which permit the court to refuse an attachment request if the court concludes that the party against whom the attachment is sought is affluent and that it is improbable that he will hide or transfer assets or declare bankruptcy. Moreover, as will be discussed below, much of an individual's personal property and business assets by law are exempted from attachment, making fewer assets available to satisfy the debt due. On the other hand, the preponderance of the use of attachment in the case of pretrial ship arrests probably results from the fact that foreign flag vessels are only briefly within Saudi jurisdiction and the defendant has no other assets in Saudi Arabia.

#### **A. PRETRIAL ATTACHMENT**

If a plaintiff believes that the defendant will transfer his assets, disappear, or declare bankruptcy, the plaintiff can petition the court, or the regional governor as appropriate, for an order to attach the defendant's assets.<sup>72</sup> This petition may be filed before or at the same time as a claim is filed, or during the proceedings. The effect of the attachment is to "freeze" the assets until the outcome of the trial.

When the pretrial attachment is requested, the following conditions must be met:

- the debt must be due;
- the amount of the debt must be known or, if it is not known, must be capable of being quantified by the court;
- the obligation to make payment in respect of the debt must be unconditional;
- the application must be in respect of assets of the debtor (and not of the debtor's relatives or a third-party debtor to the debtor/defendant) although the assets may be in the possession of third parties; and

72. Provisional attachment in negotiable instruments disputes is provided for in article 5 of the Ministry of Commerce Res. No. 859, *supra* note 24, and in article 67 (specifying provisional attachment of movable property) of the Negotiable Instruments Regulation, *supra* note 25.

- there must be evidence of debt, i.e., an official document, statements or letters signed by the debtor, or any other evidence acceptable to the court.<sup>73</sup>

The plaintiff's petition also must indicate the nature of the debt due to him and the nature and location of the assets to be attached, the latter information frequently being difficult to ascertain. In addition, the petitioner may be requested to provide the court with a third-party guarantee (usually in the form of a bank bond) to cover any damages and expenses suffered by the defendant as a result of the pretrial attachment should the plaintiff not be successful in the lawsuit.<sup>74</sup>

If the court refuses to issue an attachment order, it must state the reasons in its decision. If pretrial attachment is granted, the order will usually be lifted if the defendant provides alternative security, for example a bank guarantee satisfactory to the court or plaintiff, or can prove he is solvent.

An attachment order is appealable within eight days of service of the order on the debtor.<sup>75</sup> Assuming there is no appeal, the plaintiff creditor must request, through the court, that the debtor defendant appear in court.<sup>76</sup> If the creditor fails to petition the court for this appearance, the attachment order can be struck down and the creditor will be made liable for the expenses incurred in obtaining the attachment order.<sup>77</sup>

## B. POST-JUDGMENT ATTACHMENT

The attachment procedure set out in CCR, part III, chapter 12, is not expressly limited to pretrial attachment. In principle, therefore, there is no reason why the procedure cannot be used after a judgment has been issued. The CCR deals only with attachment, however; it contains no provisions dealing with the judicial sale of assets (other than of ships and perishable items).

The Regulation on Private Rights Claims does outline the steps that can be taken to enforce a judgment against a private individual (including the forced sale of the debtor's assets) in circumstances in which the debtor has claimed insolvency or the creditor has applied for a declaration of bankruptcy.<sup>78</sup> It is as yet unclear, however, whether the Regulation on

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73. CCR, *supra* note 25, art. 567.

74. *Id.* art 566.

75. *Id.* art 574.

76. *Id.* art. 576.

77. *Id.* art. 575.

78. Regulation on Private Rights Claims, *supra* note 10. However, the Legal Committee of the MOC early this year circulated among Saudi lawyers, for comment, a draft bankruptcy regulation. If and when such a new regulation might be promulgated (and experience suggests it requires at least a year or more for comments and final implementation), it could alter the application of the Regulation on Private Rights Claims to bankrupt persons.



Private Rights Claims will be applied to claims other than those against individuals, or to judgments of other courts that are being enforced through the Civil Rights Directorate in circumstances other than insolvency or declaration of bankruptcy.

Under the Regulation for Private Rights Claims, as noted, as soon as any assets (whether movable or immovable) of the debtor are identified following the issuance of a judgment, the debtor (and his creditors) are referred to the shari'a court for an order directing the debtor to settle his debt within a specified period even if this requires him to sell his personal property or real estate.<sup>79</sup> If the debtor fails to comply with that order, the parties then must appear again before the shari'a court, which itself then is to direct the sale of as much of the debtor's movable and immovable property as will enable him to settle his indebtedness.<sup>80</sup> If it can be shown the debtor is insolvent and not hiding his assets, the shari'a court can release him from his obligations.

### C. PROPERTY AVAILABLE FOR ATTACHMENT

The CCR prohibits the attachment of certain assets, such as the debtor's residence, furniture, clothing, professional or trade equipment, and funds sufficient for salaries of his servants and employees.<sup>81</sup> As this prohibition can severely limit the assets available for attachment, it may be another reason why creditors have not attempted to attach assets. Similarly, a debtor's equipment on public sector construction sites, that is, where the employer is a government entity, cannot be attached without the permission of the employer. Indeed, if a government employer dismisses a contractor and replaces him with another, the employer has the right to maintain the contractor's equipment on the site for the use of the replacement contractor until the project is completed.<sup>82</sup>

Theoretically one can attach any movable and immovable item other than those assets listed above as protected from attachment. Frequently, however, the problem is one of identifying movable and immovable items as Saudi Arabia has no system of recording security interests in movables or immovables other than real estate and vessels. Assuming an attachment order is obtained for movable items, they can be sold immediately if they are perishable.<sup>83</sup> However, if, in the case of a pretrial attachment, the

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79. *Id.* art. 15.

80. *Id.* art. 16.

81. CCR, *supra* note 25, art. 570.

82. Article 33, Implementing Regulations, Procurement of Government Purchase and Execution of its Projects and Works Law, No. 2131.17 dated 5/5/1397 H (Apr. 23, 1977 G).

83. CCR, *supra* note 25, art. 571.

sale later proves unjust (because, for instance, the plaintiff creditor is not successful in his court action on the merits), the party requesting the sale of perishables is liable for damages or losses arising from the premature sale.<sup>84</sup> Nonperishable movable items can be attached through a court seal being placed on the warehouse where the items are stored. Pretrial attachment of immovable items and registered property, i.e., real estate and vessels, is in the form of a no-dealing order placed by the court on the relevant register to prevent the property's sale, further mortgage, or other disposal.<sup>85</sup> A notary's register of ownership of real property is not public, however, and even a registry that is of public record, such as that of ship mortgages, will not provide information (at least in writing) as to registration particulars. Thus, information required for a no-dealing order may be difficult to procure. Funds standing to the credit of a bank account can theoretically be attached, but the author is aware of no specific instances when such action has been taken.

#### D. DISTRIBUTION OF PROCEEDS FROM SALE OF ATTACHED ASSETS

More than one creditor can simultaneously seek an order for attachment of the debtor's assets. Unless another creditor has a legal priority (through a mortgage, or for the payment of taxes or other debts due to the government), the attachments are considered to rank equally. According to CCR article 582, "a general priority shall have precedence over a specific priority, and both shall have precedence over all other debtors." Saudi Arabia has no concept of "first in time, first in right," that is, the concept that the first nonsecured creditor in a category of creditors to file a bona fide claim has priority over other bona fide creditors who file claims subsequently. In addition, there is no regulation covering fraudulent preferences.

If the sale of the attached assets results in the debtor's bankruptcy, or if the defendant already has been declared bankrupt, the court may cause the proceeds from the sale of the assets to be distributed to all creditors, whether they are judgment creditors or have simply filed a claim with the court. In this case, based on the CCR and the shari'a, it is likely (but cannot be assured) that the distribution might be as follows:

- payment of due but unpaid salaries of the bankrupt's employees;
- payment of the expenses of the bankrupt and his dependents, including government taxes and social insurance payments for employees of the bankrupt;

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84. *Id.* art. 580.

85. *Id.* art. 572.

- return to owners of any monies or property held in trust by the bankrupt;
- payment of a mortgagee from the sale of mortgaged or pledged property;
- payment to persons having a right of blood money or *diyah*, a private right of payment vested in the deceased's heirs for the deceased's wrongful death; the amount of blood money is fixed by regulation;
- payment to persons physically in possession of the bankrupt's goods; and
- the remainder distributed pro rata among other creditors. From the author's discussions and experience in Saudi Arabia, it generally is thought that bank creditors may be paid last.

#### XIV. Use of Arabic Language

Although contracts and agreements need not be executed in Arabic to be legal or enforceable, all documents submitted to a Saudi arbitration panel, committee, or a court must be in Arabic or be translated into Arabic by a Saudi government-licensed translator. Similarly, the actual court proceedings are always to be in Arabic.<sup>86</sup>

#### XV. Damages

The issue of damages is governed by shari'a, notwithstanding the Government Purchases Regulation and other rules. Simply stated, consequential, indirect, and speculative damages are viewed generally as nonrecoverable through a Saudi court of law. Only direct damages and, if specified in a contract, liquidated damages generally are recoverable.

Additionally, interest is not recoverable. Thus, if a bank sues on a promissory note written for a single amount covering both interest and principal, the court usually will enforce only payment of the principal if the defendant raises interest as a defense and the plaintiff cannot disprove the defendant's contention. The author is aware of one case (and there may be others) in which a Saudi individual sued a bank for reimbursement of interest paid to the bank *several years after* he had, without protest, repaid a loan in its entirety (i.e., including interest). The court ordered the bank to repay the amount of interest the borrower had paid.

In another case about a decade ago when the defendant, in an action by a bank for a loan default, counterclaimed for interest already paid on the grounds it was illegal, the court ordered an amount equal to the interest

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86. See *supra* note 49 as to possible permission for arbitration proceedings and documents to be in English for disputes of Saudi incorporated limited liability companies.

paid to be paid to the public treasury rather than refunded to the defendant. The court reasoned that the defendant was just as wrong in agreeing to pay interest on a loan as the bank was in charging it.

Companies bringing claims against the government for overdue payments will not be awarded interest *per se*. However, in one case apparently involving the Ministry of Education and published in Volume I of the Compilation of the Board of Grievances' Decisions, the Board granted a company "compensation for loss of use of its money" in an amount equivalent to twenty percent per annum of the delayed payments.<sup>87</sup> While this decision stands, the author understands that its correction in future cases has been requested by the Board's review committee and one should not regard it, therefore, as having set a precedent. Nevertheless, it is always possible that a claim for compensation for loss of money may be granted. Consequently, care should be taken in the wording of the relevant claim so as to cover compensation for loss of use of money (and not interest) and to provide proof of costs (such as the costs of borrowing money), so as to establish that the borrowing was directly mandated by, and that the loss suffered was a direct result of, the contractor's failure to receive payments when due.

## **XVI. Commencement and Costs of Litigation**

Generally, only Saudi nationals are permitted to appear as legal representatives before the CSCD, CPC, and Board of Grievances. Non-Saudis may appear before the Labor Commissions and shari'a courts. In all instances parties can appear *pro se*. If the party does not appear *pro se*, his representative (whether a lawyer or nonlawyer) must have a proper power of attorney. If the power of attorney is issued in Saudi Arabia, it must be notarized by a Saudi notary and be in Arabic. The notary will require evidence that the grantor has authority to grant a power of attorney. If the power of attorney is issued outside Saudi Arabia, it must be notarized in accordance with the notarial procedures of the country of issue and consularized by the Saudi embassy in that country. The document then must be translated into Arabic, if not already translated, and attested in Saudi Arabia by the Ministries of Foreign Affairs and Justice. Generally one's appointed Saudi lawyer can arrange for translation and attestation.

Saudi legal fees for litigation vary greatly, but generally appear to include a success fee, which in the author's experience can range from five

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87. See Decision No. 58/T/1398, Session 13/14/11/1398, case 212/G/396 as published in Volume I of the Compilation of Board of Grievances Decisions. Although the names of parties are deleted from the compilation, the text suggests the defendant was the Ministry of Education.

to forty-five percent of the amount recovered. In some cases the success fee will be the only amount charged; in others there may be separate charges for hours worked and disbursements incurred. In yet other cases these separate charges are invoiced and paid regularly, but ultimately credited against the success fee. If the lawyer is not successful, those invoices are the actual costs paid. In arbitrations, arbitrators have been known to ask for a set amount of fees to be paid up front; in other arbitrations, the arbitrators have requested a percentage of the award.

As litigation can be time-consuming and subject to numerous court adjournments and other delays, clients frequently become impatient with the progress of litigation or costs paid without having tangible evidence of the likelihood of success. Potential litigants would be well-advised, unless already using and being pleased with a local law firm for general corporate affairs, to interview various law firms to ascertain litigation costs, the number of Saudi lawyers available to appear in court (as a lawyer may have simultaneous hearings in two different courts and will adjourn one if he has no colleague to handle it), and the likelihood the Saudi lawyer actually will vigorously defend his client and not simply "appear" at a hearing to deposit a written submission. Although non-Saudi lawyers may interface with the client and actually draft the pleadings before translation, the Saudi lawyer generally must attend the hearing. Just as in other jurisdictions, a prospective litigant also might request from a Saudi lawyer, or otherwise determine, the names of some of his clients and inquire about his capabilities in court from those clients.

Anyone contemplating litigation in Saudi Arabia should anticipate court and enforcement delays, especially in the SAMA Committee, CPC, and CSCD, which convene only in the evenings. One also should realize that court proceedings and documents must be in Arabic, that discovery is not utilized as frequently and easily as in other forums, that the concept of pleading in the alternative is not recognized, and that even written submissions in a court (as opposed to arbitration) may not be prepared by the Saudi lawyer in as great detail as in other jurisdictions. Indeed, a claim that the client might consider substantial and highly complex might be summarized by the lawyer in five pages, with documentary evidence in a separate volume that the judicial panel may never fully review.

Finally, Saudi Arabia has no system of binding judicial precedent or case law. Hence, save possibly for labor law cases or undisputed negotiable instrument cases that follow specific and substantive regulations, the parties cannot predict or expect a certain decision. Except for the Board of Grievances decisions, no compilation of court cases exists, and even the Board cases are only partially compiled. As previously stated, the published Board decisions should be viewed only as reflective of how those particular judges might rule on a certain set of facts; the decisions are not precedential or dispositive.

